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NO. 87-6984

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

MICHAEL E. SHARP,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence of an unadjudicated, extraneous offense was properly admitted at the punishment phase of Sharp's capital murder trial.

2. Whether evidence which was the product of an illegal arrest was improperly admitted at trial.

3. Whether Sharp has preserved error relating to his claim that the indictment was read and his "not guilty" plea entered outside the presence of the jury and, if so, whether that error is of constitutional dimension.

4. Whether the search of the truck Sharp was driving was proper because based on the consent of an agent for the company which owned the truck.

5. Whether the Texas capital sentencing statute is constitutionally infirm.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	3
SUMMARY OF ARGUMENT	3
REASONS FOR DENYING THE WRIT	4
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	4
II. THERE IS NO CONSTITUTIONAL INFIRMITY IN THE ADMISSION OF EVIDENCE OF AN EXTRANEOUS OFFENSE AT THE PUNISHMENT PHASE OF SHARP'S TRIAL.	4
A. The evidence was relevant to the special issues on punishment at a Texas capital murder trial.	4
B. Sharp's claim of a violation of his fifth and sixth amendment rights to counsel is foreclosed by his failure to preserve error for state appellate review.	7
III. SHARP IS NOT ENTITLED TO RELIEF ON HIS CLAIM THAT THE ARREST WARRANT WAS BASED ON AN AFFIDAVIT WHICH DID NOT ESTABLISH PROBABLE CAUSE.	7
A. Sharp did not preserve error, if any, for appellate review.	7
B. Even if the affidavit was insufficient and the arrest illegal, any error was harmless beyond a reasonable doubt.	8
IV. SHARP IS NOT ENTITLED TO RELIEF ON HIS CLAIM THAT THE JURY DID NOT HEAR THE INDICTMENT READ OR HIS PLEA OF "NOT GUILTY."	9
A. Sharp did not preserve error, if any, for appellate review.	9
B. Error, if any, was not of constitutional dimension.	9

TABLE OF CONTENTS, CONTINUED

		Page
V.	THE SEARCH OF THE TRUCK SHARP WAS DRIVING WAS LAWFUL BECAUSE IT WAS DONE PURSUANT TO THE VALID CONSENT OF AN AGENT OF THE COMPANY WHICH OWNED THE TRUCK.	10
VI.	SHARP'S CHALLENGE TO THE TEXAS CAPITAL SENTENCING STATUTE IS MOOT OR, IN THE ALTERNATIVE, MERITLESS.	11
CONCLUSION		12

TABLE OF AUTHORITIES

Cases	Page
Beck v. Washington, 369 U.S. 541 (1962)	11
Cardinale v. Louisiana, 394 U.S. 437 (1969)	11
Crowell v. Randell, 10 Pet. 368 (1836).	11
Dunaway v. New York, 442 U.S. 200 (1979).	8
Fahy v. Connecticut, 375 U.S. 85 (1963)	8
Franklin v. Lynaugh, ___ U.S. ___, 43 Crim.L.Rep. 3120 (June 22, 1988).	4,11,12
Frazier v. Cupp, 394 U.S. 731 (1969).	10
Godchaux Co., Inc. v. Estopinal, 251 U.S. 179 (1919).	11
Harrington v. California. 395 U.S. 250 (1969)	8
Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433 (1985)	11
Hill v. California, 401 U.S. 797 (1971)	11
Illinois v. Gates, 462 U.S. 213 (1983).	11
Jurek v. Texas, 428 U.S. 262 (1976)	6
Michigan v. Long, 463 U.S. 1032 (1983).	7,8,9
Moore v. Illinois, 434 U.S. 220 (1977).	8
O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied sub nom. O'Bryan v. McKaskle, 465 U.S. 1013 (1984)	6
Owings v. Norwood's Lessee, 5 Cranch 344 (1809)	11
Penry v. Lynaugh, cert. granted, ___ U.S. ___ (June 30, 1988).	12
Schneckloth v. Bustamonte, 412 U.S. 218 (1973).	10
Smith v. Murray, ___ U.S. ___, 106 S.Ct. 2661 (1986). .	7
Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982)	9
Tacon v. Arizona, 410 U.S. 351 (1973)	10,11

Constitutions, Statutes and Rules

U. S. Const., amend. IV	2
U. S. Const., amend. V	2,7
U. S. Const., amend. VI	2,7
U. S. Const., amend. VIII	2
U. S. Const., amend. XIV	2

	Page
28 U.S.C. § 1257(3)	1
Sup. Ct. R. 17	4
Judiciary Act of 1789, 20 § 25, 1 Stat. 85	11
Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987).	2
Tex. Code Crim. Proc. Ann. art. 44.24(a) (Vernon Supp. 1987).	9

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming Sharp's conviction and sentence of death is attached to the petition as Appendix A. Sharp v. State, 707 S.W.2d 611 (Tex. Crim. App. 1986).

JURISDICTION

Sharp seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Sharp."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sharp relies on the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution. Also involved herein is the Texas capital sentencing statute, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On November 24, 1982, Sharp was indicted for the offense of capital murder in Cause No. 2971 in the 109th District Court of Winkler County, Texas. The indictment alleged that on or about June 11, 1982, Sharp did "intentionally and knowingly cause the death of an individual, Brenda Kay Broadway, by stabbing the said Brenda Kay Broadway with a knife . . . " while in the course of kidnapping her (Tr. 1).[2] On March 7, 1983, the court granted Sharp's motion for change of venue (Tr. 41, 57), and Sharp subsequently was tried by a jury, on his plea of "not guilty," in the 112th District Court of Crockett County. On May 19, 1983, the jury found Sharp guilty of capital murder as charged in the indictment (Tr. 94). That same day, following a separate hearing on punishment, the jury answered affirmatively the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071, and, accordingly, the court assessed punishment at death.

Sharp's conviction and sentence of death were automatically appealed to the Texas Court of Criminal Appeals, which affirmed on April 9, 1986. Sharp v. State, 707 S.W.2d 611 (Tex. Crim. App. 1986). Rehearing was denied without written order on September 24, 1986. On March 14, 1988, Sharp filed a motion to withdraw the court's mandate in order that he might file out-of-time the instant petition for writ of certiorari. The court, in an order dated March 15, 1988, withdrew its mandate for sixty

[2]"Tr." refers to the transcript of Sharp's trial. "SF" refers to the statement of facts.

days. Subsequently, on May 16, 1988, the court granted Sharp's motion to keep the mandate withdrawn until July 18, 1988.

B. Statement of Facts

The sordid facts of the offense for which Sharp was convicted and sentenced to death are set out in the opinion of the court below. Sharp v. State, 707 S.W.2d at 613-14. The facts pertinent to each of Sharp's claims will be set out in each of the state's arguments, infra.

SUMMARY OF ARGUMENT

There are no special or important reasons to consider the questions presented.

Evidence of an extraneous offense was properly admitted at the punishment phase of Sharp's capital murder trial. The evidence was probative on the issue of Sharp's future dangerousness, and its admission was consistent with the rationale of the Texas statute that the jury be allowed to consider all relevant evidence at sentencing.

The court below refused to review Sharp's claim of an illegal arrest because he had not perfected an appellate record. That court's reliance on an adequate, independent state ground bars review by this Court. In the alternative, any error was harmless beyond a reasonable doubt.

Similarly, the court below also relied on an adequate, independent state ground in rejecting Sharp's claim relating to the reading of the indictment. In the alternative, this state law claim presents nothing for review by this Court.

The search of the truck Sharp was driving was proper because it was based on the consent of an agent for the company which owned the truck. Sharp merely asks this Court to review the factual determinations of the court below, an undertaking which is not within the ambit of the Court's certiorari jurisdiction.

Sharp's challenge to the Texas capital sentencing statute was not raised in the court below and, consequently, is not before this Court. In the alternative, this claim is moot in

light of the Court's decision in Franklin v. Lynaugh, ___ U.S. ___, 43 Crim.L.Rep. 3120 (June 22, 1988).

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Sharp has advanced no special or important reason in this case, and none exists.

II.

THERE IS NO CONSTITUTIONAL INFIRMITY IN THE ADMISSION OF EVIDENCE OF AN EXTRANEOUS OFFENSE AT THE PUNISHMENT PHASE OF SHARP'S TRIAL.

A. The evidence was relevant to the special issues on punishment at a Texas capital murder trial.

Sharp makes two separate attacks on the admission of evidence, at the punishment phase of his trial, that he had led law enforcement officers to the body of another woman who was abducted and murdered. The evidence in question was the testimony of Odessa Police Department detective Jerry Smith, who testified that "[t]he Odessa Police Department received a missing persons report on Blanca Arreola on May the 17th of 1982 at around six thirty p.m. She was reported missing from the vicinity of the Skaggs Grocery Market at Seventh and Allred in Odessa, Texas." (SF IV 557). Smith testified that he talked with Sharp while he was incarcerated and awaiting trial for the murder of Brenda Broadway and that "[h]e [Sharp] told me the location of her [Blanca Arreola's] body." (SF IV 562). After officers attempted unsuccessfully to find the body at the stock tank to which Sharp directed them, he accompanied them to the site and helped to search for the body.

A. We then proceeded back to the grave site and upon our arrival there, he pointed out the area where he believed that she was buried.

Q. All right, sir. Was it at the tank that he had told you the second time was the proper tank?

A. Yes.

Q. What, if anything, did you do then?

A. At that time, we searched the area and attempted to find the grave site with Mr. Sharp there.

Q. When you say we, who are you including?

A. Myself and Captain Roberts.

Q. Did he at any time tell you in what position you would find the body if you found a body?

A. Yes, sir, he did.

Q. What did he tell you? When did he tell you?

A. That would have been at the grave site.

Q. All right, sir.

A. He advised that she would be buried face down. Her feet would be closest to the water and covered very shallow with some type of dirt.

Q. Buried face down with feet closest to the water?

A. Yes, sir.

Q. All right, sir. Did he help you look for the body?

A. Yes, sir, he did.

Q. In what way did he help you?

A. He assisted in trying to dig in the area for the body.

Q. When he told you how the body would be located, when you found it, did he tell you whether or not she was clothed?

A. Yes, sir, he did.

Q. What did he tell you?

A. He said there would be no clothes.

(SF IV 567-68).

After the officers still were unable to find the body, Sharp provided them further assistance as to its location and also advised them that there was too much water in the tank at that time (SF IV 568-69). The officers then pumped some water out of

the tank, after which they managed to find the body. It was in the general area designated by Sharp, buried under six inches of dirt, face down and naked with the feet pointed to the water -- just as Sharp had described (SF IV 570). Smith also testified that the officers who found the body received no clues or assistance from anyone other than Sharp (SF IV 571).

Sharp first challenges the admission of this evidence on the ground that it was not relevant to the issue of his future dangerousness (Petition at 7). This argument must fail, however, for the simple reason that past behavior is always the most accurate indicator of future behavior. It is for this reason that the Texas Court of Criminal Appeals has consistently held that the facts of a particular capital murder, standing alone, may support a "yes" answer to the special issue on future dangerousness. See, e.g., O'Bryan v. Estelle, 714 F.2d 365, 386 (5th Cir. 1983), cert. denied sub nom. O'Bryan v. McKaskle, 465 U.S. 1013 (1984). Thus, admission of this evidence was fully consistent with the focus of the Texas capital sentencing statute, which is for the jury to be able to consider all relevant evidence in answering the special issues. See Jurek v. Texas, 428 U.S. 262, 276 (1976).

As part of this argument, Sharp also asserts that this evidence should not have been admitted because "[t]here was no testimony of the commission of any criminal act of violence by the petitioner in connection with the disappearance of Blanca Arreola" and, therefore, "[t]he jury was implicitly being asked (after already finding the petitioner guilty of the capital murder of Brenda Kay Broadway) to wildly speculate on the circumstances of the death of Blanca Arreola and its relation to the probability that the petitioner would commit criminal acts of violence in the future." (Petition at 7). In fact, however, the prosecutor never stated to the jury that Sharp had killed Arreola; rather, he simply summarized the testimony of Detective Smith and invited the jury to draw its own inferences. Given the highly detailed instructions given by Sharp as to the location of

the body, it certainly would have been permissible for the jury to infer that he had killed Blanca Arreola or, at the very least, had participated in her murder. If the jury in fact made that inference, as it was entitled to do, the evidence in question was highly relevant to the special punishment issues. If the jury failed to so infer, then Sharp could not have been unfairly prejudiced by Smith's testimony. Here, as in Smith v. Murray, ___ U.S. ___, 106 S.Ct. 2661 (1986), "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." Id. at 2668. In sum, the testimony of Detective Smith was admissible and probative on the issues the jury was required to decide on punishment.

B. Sharp's claim of a violation of his fifth and sixth amendment rights to counsel is foreclosed by his failure to preserve error for state appellate review.

Sharp makes the additional challenge to Detective Smith's testimony that it was in violation of his fifth and sixth amendment rights to counsel. Because Sharp did not object on this basis when the evidence was admitted at trial, the state appellate court below refused to consider this ground. Sharp v. State, 707 S.W.2d at 618. Thus, the court below's rejection of this claim was based on an adequate, independent state ground, i.e., Sharp's failure to make the proper objection at trial. See, e.g., Michigan v. Long, 463 U.S. 1032, 1038-1044 (1983).

III.

SHARP IS NOT ENTITLED TO RELIEF ON HIS CLAIM THAT THE ARREST WARRANT WAS BASED ON AN AFFIDAVIT WHICH DID NOT ESTABLISH PROBABLE CAUSE.

A. Sharp did not preserve error, if any, for appellate review.

Sharp argues that the arrest warrant pursuant to which he was taken into custody did not establish probable cause for the arrest. The court below refused to consider this contention because Sharp did not fulfill his obligation to ensure that the warrant was contained in the appellate record before it. Sharp v. State, 707 S.W.2d at 617. Thus, the decision of the court

below was based on an adequate, independent state ground which bars review by this Court. Michigan v. Long, supra.

B. Even if the affidavit was insufficient and the arrest illegal, any error was harmless beyond a reasonable doubt.

Assuming arguendo that Sharp's arrest was illegal, he nonetheless is not entitled to relief because the admission of any evidence seized as a result of that arrest was harmless beyond a reasonable doubt. Sharp neither identifies any particular items of evidence nor cites to the record where such evidence was introduced. Instead, he merely makes the conclusory statement that "the trial court should have suppressed all evidence obtained and introduced, including evidence of the identification of petitioner by Selena Elms at a lineup, photographs taken of petitioner, and the in-custodial interrogations of petitioner." (Petition at 14).

As to any "interrogations" of Sharp, the record reflects that no confession or statement by Sharp was introduced in evidence. For that reason, this case is unlike Dunaway v. New York, 442 U.S. 200 (1979), in which the Court held to be inadmissible a confession taken as the result of an illegal detention.

Therefore, the only items of evidence which might arguably have been found as a result of the arrest of Sharp were a photograph of him and testimony that he was positively identified in a lineup. It is well established that the introduction of illegally obtained evidence may be harmless, Fahy v. Connecticut, 375 U.S. 85 (1963), as may an identification based on an illegal lineup. Moore v. Illinois, 434 U.S. 220 (1977). It is further well settled that overwhelming evidence of guilt is a primary consideration in any harmless error analysis. Harrington v. California, 395 U.S. 250 (1969). Here, the evidence of Sharp's guilt was truly overwhelming. He was unequivocally identified by an eyewitness to the offense and, significantly, did not testify or in any way contest her identification of him. Under these circumstances, any error regarding the lineup identification or the photograph of Sharp was harmless beyond a reasonable doubt.

IV.

SHARP IS NOT ENTITLED TO RELIEF ON HIS CLAIM THAT THE JURY DID NOT HEAR THE INDICTMENT READ OR HIS PLEA OF "NOT GUILTY."

A. Sharp did not preserve error, if any, for appellate review.

Sharp argues that his conviction should be reversed because the record does not reflect that the indictment was read and his plea of "not guilty" was entered in the jury's presence. The court below rejected this claim because the record did not affirmatively reflect that the indictment was not read to the jury, and absent such an affirmative showing, a state statute, Tex. Code Crim. Proc. Ann. art. 44.24(a) (Vernon Supp. 1987), mandates that the proceedings be accorded a presumption of regularity. Sharp v. State, 707 S.W.2d at 616. Because Sharp failed to perfect a record on this point in compliance with Texas rules of criminal procedure, review by this Court is foreclosed by the court below's reliance on an adequate, independent state ground. Michigan v. Long, supra.

B. Error, if any, was not of constitutional dimension.

In the alternative, even if this claim were properly before this Court, Sharp nonetheless would not be entitled to relief. Sharp's claim regarding reading of the indictment is based solely on a provision of the Texas Code of Criminal Procedure and does not rise to constitutional magnitude. See, e.g., Smith v. Phillips, 455 U.S. 209, 221, 102 S.Ct. 940, 948 (1982) ("Federal courts hold no supervisory power over state judicial proceedings and may intervene only to correct errors of constitutional dimension."). Moreover, there is no substance to Sharp's self-serving speculation that such error might result in "unreliable verdicts and sentences of death . . . " (Petition at 16), particularly in light of the undisputed fact that the jury was made aware of Sharp's plea prior to its deliberations. See Sharp v. State, supra.

V.

THE SEARCH OF THE TRUCK SHARP WAS DRIVING WAS LAWFUL BECAUSE IT WAS DONE PURSUANT TO THE VALID CONSENT OF AN AGENT OF THE COMPANY WHICH OWNED THE TRUCK.

In upholding the search of the truck Sharp had been driving for the oil company for which he worked, the court below found that it was proper because based on the consent of Sharp's supervisor, W. C. Stokes. Sharp v. State, 707 S.W.2d 617. There is no question as to the propriety of third-party consent searches, which this Court long has recognized as constitutionally permissible. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Frazier v. Cupp, 394 U.S. 731 (1969). Instead, Sharp merely calls into question the court below's factual determination that Stokes exercised sufficient control over the truck to render his consent lawful and binding. Thus, Sharp presents no question of substantial importance which might justify exercise of the Court's certiorari jurisdiction. See, e.g., Tacon v. Arizona, 410 U.S. 351, 352 (1973).

Moreover, the court below correctly found that Stokes was authorized to consent to the search of the company truck Sharp had been driving. The record fully supports that court's conclusion that Stokes "had unconditional authority to assign or reassign trucks to all tool pushers under his supervision . . . " and that Stokes' testimony to this effect "was not controverted or impeached . . . " Sharp v. State, 707 S.W.2d at 617. Sharp's argument in this Court is merely that Stokes could not validly consent to a search of the truck because he (Sharp) drove the truck daily and "Stokes never had the truck in his actual physical possession from the time he first assigned it to the petitioner in February of 1982 until after the warrantless search and seizure had been conducted." (Petition at 19). This argument is a non sequitur. Regardless whether Stokes actually drove the truck during the time it was assigned to Sharp, the undisputed evidence showed that he had the authority to do so, and, indeed, had the authority to take the truck from Sharp at any time.

There is no merit to Sharp's attack on the validity of Stokes' consent or the subsequent search of the truck.

VI.

SHARP'S CHALLENGE TO THE TEXAS CAPITAL SENTENCING STATUTE IS MOOT OR, IN THE ALTERNATIVE, MERITLESS.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court below. E.g., Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433, 436-37 (1985); Illinois v. Gates, 462 U.S. 213, 218-222 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919). Sharp concedes that his challenge to the Texas capital sentencing statute was not raised in the court below; therefore, it is not properly before this Court.

Even were the Court to review this claim, Sharp nonetheless is not entitled to relief. Sharp asserts that "this case presents precisely the same issue that is before the Court in Franklin v. Lynaugh." (Petition at 22). Inasmuch as the case upon which Sharp relies was decided adversely to him, see

Franklin v. Lynaugh, ___ U.S. ___, 43 Crim.L.Rep. 3120 (June 22, 1988), this claim is moot. Moreover, there would be no merit to any attempt by Sharp to attempt to bring his case within the ambit of Penry v. Lynaugh, cert. granted, ___ U.S. ___ (June 30, 1988). Sharp presented no evidence in mitigation at the punishment phase of his trial. Thus, regardless of the Court's decision to grant review in Penry, it can avail Sharp nothing.

CONCLUSION

For these reasons, the state respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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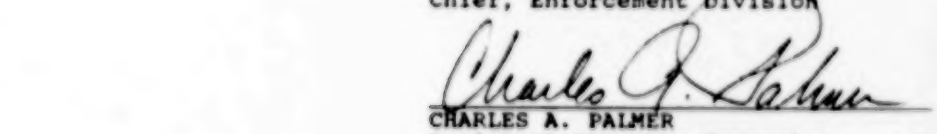

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